In forma pauperis
Petition not printed

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 669

BENNY LURK, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 21, 1960
CERTIORARI GRANTED JANUARY 23, 1961

Supreme Court of the United States

OCTOBER TERM, 1960

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BENNY LURK, PETITIONER,

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[fol. A]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal Action No. 180-60

UNITED STATES OF AMERICA

v.

BENNY LURK, DEFENDANT

Washington, D. C.
Tuesday, March 22, 1960.

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for trial at 11:15 a. m. before the HONORABLE JOSEPH R. JACKSON, Judge, and a jury.

APPEARANCES:

On behalf of the Government:

JOHN W. WARNER, JR.
Ass't United States Attorney.

On behalf of the defendant:

RALPH C. COLE, ESQ.
1735 - 14th St. N.W.
Wash. 9, D. C.

[fols. 3-8]

[fol. 9] CHARLES C. EDGEWORTH

was called as a witness by and on behalf of the Government and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

[fol. 10] BY MR. WARNER:

[fol. 11] A. I paid the girl for my 2 meals and bottle of beer and the other girl was getting them ready and I was sitting there drinking the beer and a boy walked in with him.

Q. When you say him, who do you mean?

A. With Benny. The other fellow was in front of Benny.

Q. When you say Benny, do you mean one Benny Lurk?

A. That is right.

Q. The defendant in this case?

A. That is right.

Q. Where is he in the courtroom today?

A. Sitting right here.

Q. How is he dressed?

A. He was dressed—

Q. How is he dressed today?

THE COURT: How is he dressed now?

THE WITNESS: He has got on a brown jacket.

BY MR. WARNER:

Q. With or without necktie?

A. No necktie.

MR. WARNER: May the record show this witness has identified the defendant, Your Honor?

THE COURT: The record may so show.

BY MR. WARNER:

[fol. 12] Q. Now, Mr. Edgeworth, have you known the defendant prior to this day, December 14, 1959?

A. I didn't know his name, but I knew his face.

Q. You had seen him before, correct?

A. Yes, sir.

Q. Where had you seen him?

A. In Occoquon.

MR. WARNER: I think we should strike that answer, Your Honor. I didn't realize that was the case.

THE COURT: It may be stricken.

BY MR. WARNER:

Q. So you had seen him before this date, is that correct?
A. That is right.

[fols. 13-14]

[fol. 15] CROSS EXAMINATION

BY MR. COLE:

[fols. 16-26]

[fol. 27] Q. And what did you do at headquarters?
A. I described the men to them and told them what happened.
Q. And you told them that you knew this man; is that correct?
A. I told them I knew his face but didn't know his name.
Q. I believe you mentioned that you knew this man at Occoquon; is that right?
MR. WARNER: I think that answer has been stricken from the record, Your Honor.
THE COURT: The question may be stricken.
MR. COLE: Your Honor, I believe I have a right to ask where he knew this man.
THE COURT: If this man has a record all right. Why do you mention Occoquon?
MR. COLE: Of course, we are not introducing his record at this time, but I think—
THE COURT: Why don't you ask him where he saw him first?

BY MR. COLE:

Q. Where did you first see this man, Mr. Lurk?
A. 7th and T.
Q. When was this?
[fol. 28] A. Over 4 or 5 years ago, maybe longer.
Q. Did you know him at that time?
A. No, I never knew him. I just knew his face when I would see him.

Q. You saw this man for the first time in your life at 7th and T Streets, Northwest; is that correct?

A. That is right.

Q. What happened that impressed his identity upon you?

A. The man was sitting in the next booth to me drinking beer.

Q. 7th and T about 4 or 5 years ago?

A. Yes, it may be longer than that.

Q. Did you have any conversation with him at that time?

A. No.

Q. Well, what happened that his identification was impressed upon you at that particular time?

A. His identification wasn't impressed upon me.

Q. How can you so clearly remember that you saw Benny Lurk 5 years ago at 7th and T Streets, Northwest?

A. Any time I see a person's face one time I never forget it.

Q. I see. Now, where was the next time you saw Benny Lurk?

A. 7th and T.

[fol. 29] Q. 7th and P, as in Paul?

A. 7th and P Streets, Northwest.

Q. Is that P as in Paul?

A. Yes, P as in Paul.

Q. When was that occasion?

A. Oh, that wasn't very long after I seen him at 7th and T.

Q. At the same bar room?

A. No, it wasn't.

Q. Standing on the street?

A. Standing outside on the sidewalk. He was with some more people talking.

Q. And you talked with him?

A. No, I didn't talk with him. I was talking to another fellow named March.

Q. When was the next time that you saw him after that particular instance?

A. From time to time I have seen Benny for the l
5 or 6 years, from time to time, but not knowing
name.

Q. Would you call him a friend of yours?

A. I don't.

Q. An acquaintance?

A. No.

Q. Did you ever talk to Benny?

[fol. 30] A. Once.

Q. Where was that?

A. 7th and P.

Q. Do you recall what the conversation was?

A. He wanted to get a drink, me and him and Marc

Q. Did you want a drink too?

A. No.

Q. How long ago was that?

A. That was long in April or May.

Q. Now, you described each and every time that yo
have ever seen Benny Lurk?

A. Yes.

Q. Other than these times at 7th and P Streets, yo
have never seen Benny Lurk, is that right?

A. Yes.

Q. You have seen Benny Lurk other than those times

A. Yes.

Q. I thought you just got through—

THE COURT: He told you yes, he saw him. No
pursue your question.

THE WITNESS: Me and Benny done a year in Occo
quon, that is why I knew him.

Q. What were you charged with?

A. Assault.

[fol. 31] Q. You did a year in Occoquon?

A. That is right.

Q. You saw Benny there, you say?

A. Yes, I used to be the food adviser.

[fols. 32-52]

[fol. 53] THE COURT: Closing argument for the de
fendant.

MR. COLE: May it please the Court, may it please you ladies and gentlemen of the jury:

. . . .

[fol. 54] . . . .

. . . .

[fol. 55] These are things that you have to decide. These [fol. 56] are the facts as we have heard them from the stand from the mouth of the only witness who has identified Benny Lurk. And what kind of witness do we have? We have a witness who himself is a convicted criminal. I don't know why he identified Benny Lurk. He may have a grudge against him. He said he has known him for 4 or 5 years. And then we have this situation, over 6 weeks passes by and then suddenly one day Mr. Edgeworth, the complaining witness, sees Benny Lurk, the face that he never forgets, and he calls the police and they come. And they take Benny Lurk to headquarters.

. . . .

[fol. 57-59] . . . .

. . . .

[fol. 60] JUDGE'S CHARGE

. . . .

[fols. 62-65] . . . .

. . . .

[fol. 66] The Court instructs you that you are to draw no inferences whatsoever as to the guilt of the defendant from the fact that the complaining witness, Mr. Edgeworth, testified that he and the defendant met at Occoquon.

Testimony by the complaining witness in that respect is to be considered only in as far as it affects his credibility as a witness.

The law does not compel any defendant to take the [fol 67] witness stand and testify, therefore, no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of the defendant to testify. The defendant is under no obligation to testify when he is being tried.

. . . .

[fols. 68-70] . . . .

[fol. 71] AT THE BENCH

THE COURT: Are you satisfied with the instructions?
MR. WARNER: The Government is satisfied.
MR. COLE: Satisfied, Your Honor.

. . . .

[fols. 72-74] . . . .

. . . .

[fol. 75] Reporter's Certificate to foregoing transcript omitted in printing

[fol. 76] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Misc. No. 1481

BENNY LURK, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR LEAVE TO PROSECUTE APPEAL WITHOUT PREPAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF—Filed May 16, 1960

The petitioner, Benny Lurk being first duly sworn, on oath deposes and says that he desires to appeal from the order (or judgment) entered in the District Court on April 29, 1960 in Crim. No. 180-60, Benny Lurk v. United States of America, and is unable to pay the costs of the appeal, or to give security therefor; and that he believes that he is entitled to redress.

Your petitioner further states that subsequent to the entry of the order (or judgment) an application to prosecute an appeal from the order (or judgment) without prepayment of costs, accompanied by an affidavit in conformity with Section 1915 of Title 28, U. S. Code, was on April 28, 1960, made to the trial court, thereby enabling the trial judge to certify whether or not the appeal was taken in good faith, and that the trial court on May 4, 1960, denied petitioner's application.

The nature of the appeal is as follows:

To appeal from the conviction and judgment rendered by United States District Court for the District of Columbia on the 29th day of April, 1960, Honorable Judge Jackson presiding, and list as the reasons for his appeal the following:

1.—Denied due process of law by having incompetent counsel appointed by the court who failed to

summons witnesses who were vital to petitioner's defense.

2.—No probable cause for arrest.

3.—No positive identification made at any time.

4.—Denied a fair and impartial trial.

5.—Arrest was made on mere suspicion. (See Poldo v. United States, 55 F 2d 866, 869.) As follows: "Mere suspicion is not enough, there must be circumstances represented to the arresting officers through testimony of their senses sufficient to justify them in a good faith belief that the defendant had violated the law . . ."

[fol. 77] WHEREFORE, petitioner requests that he be allowed to appeal from the order (or judgment) without being required to prepay fees or costs, or to give security therefor.

/s/ Benny Lurk
Petitioner.

Duly sworn to by Benny Lurk. Jurat omitted in printing

[fol. 78] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

Before: Prettyman, Chief Judge, in Chambers.

ORDER APPOINTING COUNSEL—May 18, 1960

Upon consideration of the petition for leave to prosecute an appeal in forma pauperis, it is

ORDERED that Eugene Gressman, Esquire, a member of the bar of this court, is appointed to represent petitioner and allowed until June 18, 1960, to file a memorandum in support of the petition.

[fol. 79] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

MOTION FOR PRODUCTION OF TRANSCRIPT—
Filed June 15, 1960

Petitioner, through his Court-appointed counsel, hereby moves the Court for an order directing that a transcript of the trial proceedings in the District Court, held on March 22, 1960, be prepared at the expense of the United States and that petitioner's counsel be given at least 30 days following the receipt of such transcript to prepare and file a memorandum in support of the petition for leave to prosecute an appeal *in forma pauperis*. As grounds for this motion, petitioner's counsel states:

1. Following his appointment by this Court as counsel for petitioner, counsel examined the available court files, interviewed the petitioner and conferred with Mr. Ralph C. Cole, the attorney appointed to represent petitioner at the trial in the District Court. These measures were taken in order to determine as accurately as possible whether there exists any non-frivolous grounds of appeal, and, more particularly, whether there is any basis for asserting, as petitioner has done *pro se*, that (1) he was represented at the trial by incompetent court-appointed counsel who failed to summon vital witnesses, (2) that there was no probable cause for arrest, (3) there was [fol. 80] a denial of a fair and impartial trial and (4) there was no positive identification made of the petitioner at any time.

2. The absence of a transcript, however, has made it impossible for counsel to evaluate and present the merits of this appeal in such a manner as to do full justice to petitioner and to fulfill his duties to this Court. Particularly after conferring with court-appointed trial counsel, this counsel is not convinced that the trial was conducted

free of all reversible errors or that there was a complete absence of plain errors going to the justness and fairness of the proceeding.

3. Thus in a case of this nature, the merits or frivolousness of the appeal cannot be tested or determined by any means other than an examination of the trial record. The available sources of information outside the record—the formal files and the memory of certain individuals—are too incomplete and uncertain to constitute a substitute for the transcript. And if counsel is to be enabled to give full effect to the direction of the Supreme Court in *Ellis* v. *United States*, 356 U.S. 674, that "representation in the role of an advocate is required," the transcript must be made available. See *Griffin* v. *Illinois*, 351 U.S. 12.

Wherefore, it is submitted that the transcript should be prepared at the expense of the United States.

Respectfully submitted,

/s/ Eugene Grossman
1701 K Street, N.W.
Washington 6, D. C.
Counsel for Petitioner
appointed by this Court

[fol. 81] CERTIFICATE OF SERVICE
(omitted in printing)

[fol. 82] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

Before: Edgerton and Bazelon, Circuit Judges, in Chambers.

ORDER DIRECTING THAT STENOGRAPHIC TRANSCRIPT BE FURNISHED—July 8, 1960

On consideration of petitioner's motion to have stenographic transcript prepared at the expense of the United States, respondent's opposition, and petitioner's reply, it is

ORDERED by the court that petitioner be allowed to prosecute an appeal without prepayment of costs to the extent of having the transcript of the proceedings in the District Court prepared without costs, and it is

FURTHER ORDERED by the court that the stenographic transcript of proceedings in this case in the District Court be furnished to petitioner at the expense of the United States.

Per Curiam.

Dated: July 8, 1960

[fol. 83] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

MEMORANDUM IN SUPPORT OF PETITION FOR LEAVE TO PROSECUTE AN APPEAL IN FORMA PAUPERIS—
Filed August 31, 1960

This memorandum is filed pursuant to this Court's order dated May 18, 1960, appointing the undersigned counsel to represent the petitioner. On July 8, 1960, in response to a motion made on behalf of the petitioner, the Court ordered that petitioner be allowed to prosecute the appeal without prepayment of costs to the extent of having the transcript of the trial proceedings in the District Court prepared without costs and furnished to petitioner at the expense of the United States. Counsel has accordingly had the benefit of such transcript in the preparation of this memorandum.

STATEMENT OF THE CASE

On January 27, 1960, a report was filed in the District Court concerning a proceeding had the previous day before United States Commissioner James F. Splain. That report recited that the petitioner had been arrested for an alleged violation of the robbery statute, 22 D.C. Code 2901, that he had been brought before the Commissioner and informed of his right to retain counsel, and that petitioner had requested an immediate hearing. The report then summarized the testimony of the witness for the United States, Charles C. Edgeworth, as follows:

[fol. 84] ". . . on Dec. 14, 1959 while in Miss Jones' restaurant between 10 and 10:30 P.M., waiting for a carry out food order, the def. and another man came into the place; *that he knows the Def. because he*

served a year in Jail with the Def.; that the other man stuck a knife into him and said don't move; that while he was being held at knife point, the Def. went into his pockets and removed his money and also took his eyeglasses; that he was cut in the hand by the knife and the Def. and the other man ran out; that he went home and called the police." (Emphasis added).

The report concluded by stating that probable cause had been shown. Bail was fixed at $5000 and petitioner, who had not testified, was committed to jail.

On February 23, 1960, a one-count indictment was filed in the District Court charging that petitioner "stole and took from the person and from the immediate actual possession of Charles C. Edgeworth property of Charles C. Edgeworth of the value of about $58.31 consisting of the following: one billfold of the value of $2.00, $46.31 in money and one pair of eyeglasses of the value of $10.00."

The following day, February 24, Ralph E. Becker was appointed to represent the petitioner, but on February 26, Ralph S. Cole was appointed in his stead. Petitioner was arraigned on February 26, without counsel present; he entered a plea of not guilty and was remanded to the District jail. On March 4, with counsel Cole present, petitioner was arraigned again and again pleaded not guilty.

Trial was had before the jury on March 22, 1960, Judge Joseph R. Jackson presiding. At the trial, four witnesses testified for the United States and none for the defense. The testimony of the prosecution witnesses may be summarized as follows:

Charles C. Edgeworth, the complaining witness, testified that on the evening of December 14, 1959, he had gone to Miss Jones' Restaurant at 9th and O Streets, N. W., in [fol. 85] Washington, D. C., to order some food to take out. While waiting for the food to be prepared he ordered and drank a bottle of beer. Tr. 11. The petitioner and a companion walked into the restaurant at that point. The companion put a knife to Edgeworth's stomach while petitioner rifled his pockets and snatched money from his hands. Tr. 13. Edgeworth was cut on the hand by the

knife. Tr. 13. Petitioner and his companion (who was never identified) then ran out of the restaurant. Tr. 13. Edgeworth told a waitress that he had been robbed of his money. Tr. 14. He then got a cab, went home and called the police. Tr. 14. Some time later he observed petitioner near a street corner, called the robbery squad, and pointed petitioner out to the policemen who arrived in answer to the call. Tr. 14. Petitioner was thereupon arrested. Edgeworth also testified as to the amount of money and the value of the other items taken from him. Tr. 15.

Edgeworth was cross-examined thoroughly by petitioner's appointed counsel. Tr. 15-35. On cross-examination, Edgeworth recounted more details as to the incidents in the restaurant, including certain remarks made by petitioner and his companion in the course of the robbery. Tr. 18-19. He stated that there were about 15 to 20 people in the restaurant at the time. Tr. 23. He further stated that about 10 minutes elapsed between the robbery and the moment when the food he had ordered was ready. Tr. 25. He told one of the waitresses that he had been robbed, and she told him not to follow the men. Tr. 21. Finally, when his food was ready, Edgeworth departed in a cab, went home and called the police. Tr. 24. There was a phone booth in the restaurant but he did not use it. Tr. 25. The police, in response to his call from home, told Edgeworth to come to headquarters the following [fol. 86] morning. Tr. 26, at which time he told what happened and described the men. Tr. 27. He stated to the police that he knew petitioner's face but not his name. Tr. 27. Edgeworth recounted that he had seen petitioner on various occasions in the past. Tr. 27-30.

Edgeworth was also cross-examined as to the events on January 26, 1950, when petitioner was arrested. Tr. 32-35. He happened to see petitioner in front of a beer garden at the corner of 7th and P Streets, N. W. Tr. 33. Edgeworth immediately went inside a drug store and called the police, who sent a squad car. Tr. 33. Edgeworth got into the squad car and pointed out petitioner to the officers, petitioner having moved in the meantime to a parking lot on 8th Street. Tr. 34.

Annie Alston, the second prosecution witness, was a waitress at the restaurant. She recalled that Edgeworth had been in the restaurant on the night in question and that she had observed money being snatched from Edgeworth's hands. Tr. 37. She also had seen the cut on Edgeworth's hand but did not see the men who took the money. Tr. 37. On cross-examination, she testified that four men had come into the restaurant and had sat down at a table. Tr. 41. They left right after the robbery but she did not know who they were. Tr. 42. She did not see any of them rifle Edgeworth's pockets but did see one of them snatch money from Edgeworth's hand. Tr. 42. Edgeworth started to follow them out but then returned. Tr. 43. She heard him tell another waitress that he had been robbed. Tr. 43.

The other waitress referred to by Annie Alston was not produced as a witness, the Assistant United States Attorney stating that efforts to locate her had proved futile. Tr. 45.

The other two witnesses for the prosecution were *Detective George R. Wilson* and *Private David B. McQueen*. The first officer testified that Edgeworth had told him of the robbery on the morning of December 15 and had de- [fol. 87] scribed petitioner to him, though not by name. Tr. 46-47. Private McQueen testified that he had placed petitioner under arrest on January 25, after being called by Edgeworth to the vicinity of 7th and P Streets, N. W. Tr. 49-50.

Following the presentation of this testimony the United States rested its case and the defense waived "its right to place the defendant on the stand." Tr. 48. In addition to the foregoing summary of testimony, the following colloquies are to be noted:

(Direct examination of Edgeworth by Assistant United States Attorney, Tr. 12.)

Q. Now, Mr. Edgeworth, have you known the defendant prior to this day, December 14, 1959?

A. I didn't know his name, but I knew his face.

Q. You had seen him before, correct?

A. Yes, sir.

Q. Where had you seen him?

A. In Occoquon.

MR. WARNER: I think we should strike that answer, Your Honor, I didn't realize that was the case.

THE COURT: It may be stricken.

(Cross-examination of Edgeworth by petitioner's appointed counsel, Tr. 27.)

Q. And what did you do at headquarters?

A. I described the men to them and told them what happened.

Q. And you told them that you knew this man; is that correct?

A. I told them I knew his face but didn't know his name.

Q. I believe you mentioned that you knew this man at Occoquon; is that right?

MR. WARNER: I think that answer has been stricken from the record, Your Honor.

[fol. 88] THE COURT: The question may be stricken.

MR. COLE: Your Honor, I believe I have a right to ask where he knew this man.

THE COURT: If this man has a record all right. Why do you mention Occoquon?

MR. COLE: Of course, we are not introducing his record at this time, but I think—

THE COURT: Why don't you ask him where he saw him first?

(Cross-examination of Edgeworth by petitioner's appointed counsel, Tr. 30-31)

Q. You have seen Benny Lurk other than those times?

A. Yes.

Q. I thought you just got through—

THE COURT: He told you yes, he saw him. Now pursue your question.

THE WITNESS: Me and Benny done a year in Occoquon, that is why I knew him.

Q. What were you charged with?
A. Assault.
Q. You did a year at Occoquon?
A. That is right.
Q. You saw Benny there, you say?
A. Yes, I used to be the food adviser.

* * * * *

(Closing argument by petitioner's appointed counsel. Tr. 56.)

These are the facts as we have heard them from the stand from the mouth of the only witness who has identified Benny Lurk. And what kind of witness do we have? We have a witness who himself is a convicted criminal. I don't know why he identified Benny Lurk. He may have a grudge against him. He said he has known him for 4 or 5 years.

* * * * *

[fol. 89] *(Judge's charge to jury, Tr. 66.)*

The Court instructs you that you are to draw no inferences whatsoever as to the guilt of the defendant from the fact that the complaining witness, Mr. Edgeworth, testified that he and the defendant met at Occoquon.

Testimony by the complaining witness in that respect is to be considered only in as far as it affects his credibility as a witness.

* * * * *

At the conclusion of the trial, the jury found petitioner guilty as charged. A motion for a new trial was denied on March 29, 1960. Petitioner was then duly sentenced to a prison term of not less than 4 years and 9 months and of not more than 14 years and 3 months.

On April 29, 1960, the District Court granted the petition of Ralph C. Cole to be relieved of his assignment to defend petitioner. Petitioner then filed *pro se* a motion for leave to appeal *in forma pauperis*, which motion the District Court denied on May 4, 1960, "as plainly frivolous and not made in good faith."

Petitioner's *pro se* petition for leave to appeal *in forma pauperis* was filed in this Court on May 16, 1960.

Substantial Questions Presented By the Record

On behalf of the petitioner, it is submitted that there are at least two questions posed by the record that are non-frivolous and, indeed, substantial in nature so as to warrant the grant of permission to proceed *in forma pauperis*. Certain other questions raised by the petitioner *pro se* are, in the opinion of undersigned counsel, either [fol. 90] without merit or are subsumed under the first question presented herewith.[1]

---

[1] Petitioner *pro se* has made the following points:

1. He was denied due process by having incompetent counsel appointed by the District Court who failed to summon witnesses vital to the defense of petitioner. But the undersigned counsel suggests that the said appointed counsel, insofar as the formal record is concerned, conducted a vigorous defense on behalf of petitioner. Inquiry of said appointed counsel has revealed that he did not call other witnesses since he did not feel that they could contribute any testimony helpful to the defense. If there is to be any criticism of that counsel, it is in terms of his failure to raise specific objections to the questions, answers and jury charge in connection with the first substantial question presented in this memorandum.

2. There was no probable cause for arrest. But the complaint of the complaining witness and his description and pointing out of the petitioner would seem to provide sufficient cause.

3. No positive identification at any time. But the complaining witness did identify petitioner at the time of his arrest. The complete reliance on the complaining witness for identification purposes, however, is implicitly involved and is of some importance in the first substantial question discussed in this memorandum.

4. Petitioner was denied a fair and impartial trial. It is not clear to what this allegation refers. But see the first point discussed in this memorandum.

5. Petitioner's arrest was made on mere suspicion. But see point 2 above.

I. *Do the references at the trial to petitioner's past criminal record constitute plain reversible error?*

Axiomatic, of course, is the proposition that where a criminal defendant does not take the stand evidence as to his unsavory character or past criminal record is inadmissible. This is so, not because of its irrelevance, but because of a dominant policy which recognizes that what tends to show a likelihood that the accused has flouted the law at some other time is too apt to be given undue weight by the jury and to prejudice his right to a fair trial on the instant charge. *Michelson* v. *United States*, 335 U.S. 469, 475; *Boyd* v. *United States*, 142 U.S. 450.

In this case, the record contains repeated references to the fact that petitioner had previously been in prison [fol. 91] at Occoquon Workhouse, a well-known jail for District of Columbia prisoners. Since petitioner did not take the stand in self-defense, a serious and substantial question is thereby raised in terms of the above-stated policy. Full review and consideration of this case is necessary in order to determine if petitioner has been accorded a full measure of his constitutional right to a fair trial. Several facets to this problem are presented by the record:

A. *The prosecution was responsible for the first reference to petitioner's past criminal record.* As previously indicated herein (pp. 1-2, *supra*), about two months before the trial, the U. S. Commissioner filed a report which summarized the evidence of the complaining witness. That report indicated that the witness testified that he had identified the petitioner "because he served a year in Jail with the Def". And that report was presumably in the hands of the Assistant United States Attorney, *or at least available to him*, when he examined the complaining witness on the stand at the trial.

Thus when the Assistant United States Attorney asked the complaining witness where he had seen the petitioner before, he must have known or *should have known* that the witness would answer to the effect that he had seen petitioner in jail. Tr. 12. The prosecutor cannot be heard to say, as he did, that "I didn't realize that was the case." Tr. 12.

But even if it be considered that the answer was unexpected, and inadvertent from the Government's point of view, the fact remains that the answer was elicited by Government counsel and not by the defense. Cf. *United States* v. *Tramaglino*, 197 F. 2d 928, 932 (C.A. 2). Error was committed by the reference to petitioner's prior presence at Occoquon, a reference made in the presence of the jury.

[fol. 92] The availability of the earlier report of the U. S. Commissioner, however, makes pertinent the language and holding of the court in *United States* v. *Tomaiolo*, 249 F. 2d 683, 695-696 (C.A. 2):

> "And it is fairly apparent that the prosecutor knew that the answers to his questions would reveal Soviero's criminal past. Certainly the special agents of the FBI had already advised him, out of court, of the reason why Soviero refused to sign the statement.
>
> "Nor may Tomaiolo's testimony be classed as purely voluntary. Even if he did not have actual knowledge of the times during which Louis Soviero was in prison, the prosecutor had the means of gaining such information. Yet he pressed the reluctant Tomaiolo to answer . . ."

B. *The reference to petitioner's criminal record was not an isolated one but was reiterated on several occasions.* Had there been but the one instance of mentioning petitioner's former incarceration, an argument could be made that it was sufficiently isolated and immediately stricken so as to be inconsequential. See *United States* v. *Stromberg*, 268 F. 2d 256, 269 (C.A. 2). But such is not this case. Petitioner's court-appointed counsel brought out the matter again in a question[2] which was stricken before an answer could be given. Tr. 27. But almost immediately the trial judge himself mentioned Occoquon, asking coun-

[2] The attorney apparently asked the question to bring out the fact that the witness rather than the petitioner had a criminal record. Tr. 27. See his closing argument. Tr. 56. But the question was artlessly phrased and served to emphasize petitioner's record.

sel "why do you mention Occoquon?" Tr. 27. The damage was further compounded a short while later when the complaining witness, immediately after a direction by the judge to pursue the preceding question, volunteered the information again that petitioner had "done a year at [fol. 93] Occoquon." Tr. 30. This time no objection was made and the answer remained unstricken.

Finally, the Court itself, in its charge to the jury, reiterated the fact that petitioner and the complaining witness had "met at Occoquon," Tr. 66, and that this fact should be considered only in connection with the credibility of the complaining witness.

Here, then, was an accumulation of the original remark, which had been induced by the prosecution. A serious question is thus raised as to whether the mere striking of the original answer of the defense counsel's subsequent question was enough to cure the error, repeated as it was on at least four occasions. Cf. *United States* v. *Giallo*, 296 F. 2d 207, 209-210 (C.A. 2), affirmed, 346 U.S. 929. To the extent that petitioner's trial counsel contributed to the error, it must be remembered that he was appointed by the court below and was not of petitioner's own choosing. In that setting, it may be unfair to saddle petitioner with the consequences of such an error by appointed counsel. But more importantly, the whole chain of references originated in the original question by the prosecution and was repeated by the court itself and by the complaining witness without accompanying disavowals to the jury. Tr. 30, 66. Such a chain of events, all emphasizing petitioner's prior record, could only serve to prejudice the jury and deprive petitioner of a fair trial. *United States* v. *Tomaiolo*, 249 F. 2d 683, 695 (C.A. 2).

C. *The error was not cured by adequate instructions to the jury or other action of the trial judge.* When the complaining witness first mentioned the petitioner's prior incarceration, the trial judge did no more than strike the answer on the prosecutor's request. Tr. 12. The judge [fol. 94] also did no more than strike defense counsel's question referring to that previous answer, again on the prosecutor's suggestion. Tr. 27. But when the witness subsequently volunteered the fact that "Me and Benny

done a year at Occoquon," Tr. 30, the prosecutor, the defense counsel and the Court remained silent. And, to cap matters, the judge himself repeated the reference to Occoquon in the presence of the jury both during the trial, Tr. 27, and in his instructions to the jury, Tr. 66. On neither of those occasions did the judge take adequate precautions as to the possible prejudicial effect on the jury.

Simply striking the one answer and the one question was not enough. It has been held that merely telling the jury, at the suggestion of the prosecutor, to "disregard the last statement" is inadequate in the absence of a sufficient instruction. *United States* v. *Tomaiolo*, 249 F. 2d 683, 695 (C.A. 2). By the same token, the judicial statement here that the answer or the question "may be stricken," Tr. 12, 27, is inadequate in the absence of sufficient instructions. But not even that inadequate protection was afforded as to the witness' later reiteration of the prejudicial fact. Tr. 30.

The instruction to the jury on this matter was totally inadequate. Tr. 66. The judge merely told the jury that the fact that the petitioner and the witness had met at Occoquon did not permit an inference of guilt of the petitioner, that it was to be "considered only in as far as it affects his (the complaining witness') credibility as a witness." Tr. 66. Nowhere was there any command to the jury, or even a suggestion, to disregard the Occoquon references completely. There was nothing like the judicial direction in *United States* v. *Curzio*, 179 F. 2d 380, 381 (C.A. 3), "to brush it from your minds, because it has nothing to do with this case," a direction there repeated [fol. 95] in the instructions that "there is no evidence in this case that Mr. Curzio has a police record or that he has ever been convicted of any crime before, so wipe that out of your minds completely."

Nor did the judge here do what the trial judge did in *United States* v. *Stromberg*, 268 F. 2d 256, 269 (C.A. 2), and direct the jury "to pay no attention to that remark in any way . . . to disregard it completely." See also *Marsh* v. *United States*, 82 F. 2d 703, 704 (C.A. 3). In *United States* v. *Apuzzo*, 245 F. 2d 416, 420, note 4 (C.A. 2), over a strong dissent, the trial judge who himself

had indeed the improper testimony was held to have overcome the error only by promptly telling the jury that the prejudicial facts "ought not to have been brought out . . . you are to disregard anything you heard . . . blame me for anything that occurred in that respect" and by later instructing the jury that "any testimony as to any previous arrest must be disregarded as having no probative value as to the guilt or innocence of the defendant."

Here there was nothing but an unexplained striking of some of the prejudicial remarks, a striking that was devoid of any simultaneous warning to the jury to disregard the remarks. And some of the remarks were not stricken. By the end of the trial, before the instructions, the jury had firmly implanted in its mind that the petitioner had a prior criminal record. Nothing the court had done served to dismiss that fact from the jury's mind. In these circumstances, a short statement of two sentences in the instructions to disregard the prejudicial fact in determining guilt but to consider that fact in assessing the credibility of the complaining witness falls abysmally short of the judicial action essential to preserve the fairness of the trial.

[fol. 96] D. *This error was plain, substantial and reversible, even in the absence of objection by petitioner's counsel.* The references to petitioner's past criminal record were so flagrant and so prejudicial as to call for correction by this Court and a reversal of the conviction pursuant to Rule 52(a) of the Federal Rules of Criminal Procedure. As in *United States* v. *Modern Reed & Rattan Co.*, 159 F. 2d 656, 658 (C.A. 2), this Court should not "fail to notice a plain error so far reaching because no objection was taken." And compare *Surratt* v. *United States*, 269 F. 2d 240, 241 (App. D.C.). The ruling in *United States* v. *James*, 208 F. 2d 124, 125 (C.A. 2), is particularly pertinent in this connection:

> "The effect of the introduction of this testimony was too clearly to show a proclivity to commit crime and thus blacken, to his prejudice, the character of the appellant, who did not by testifying make that an

issue, to permit his erroneous admission of it to pass as harmless error."

Moreover, the only witness to identify petitioner as a participant in the crime was the complaining witness. Since it was made plain that this witness also had a criminal record, his testimony may have been substantially discredited in the eyes of the jury. And conviction of petitioner conceivably could have rested in large part upon the impression of petitioner gained by the jury during the trial as to his past criminal proclivities. By the time the instructions were given, that prejudicial factor may have become so dominant that far more than the off-hand direction to disregard the criminal record in assessing guilt may have been necessary. The inadmissible testimony may thus have been not only prejudicial but pivotal in a close case such as this. See *United States* v. *Tramaglino*, 197 F. 2d 928, 932 (C.A. 2).

It is submitted, therefore, that a substantial question [fol. 97] warranting full review is inescapably presented by the record in this case.

II. *Was the trial judge properly assigned to conduct the trial in this case?*

A second substantial question presented by this record grows out of the fact that the presiding judge, Judge Joseph R. Jackson, was a retired member of the Court of Customs and Patent Appeals acting on assignment for the year 1960 to the United States District Court for the District of Columbia. Serious constitutional questions as to the validity of that assignment and as to the power of Judge Jackson to preside at this trial are thereby raised. More particularly, the following considerations are involved:

A. *The legislative nature of the Court of Customs and Patent Appeals.* Judge Jackson retired from the Court of Customs and Patent Appeals as of April 1, 1952. See 193 F. 2d XV. As of that time there can be no question but that the said court was very plainly "a legislative and not a constitutional court." *Ex parte Bakelite Corp.*, 279 U.S. 438, 459. It was a court created solely to determine

"matters arising between the government and others in the executive administration and application of the customs laws," and its functions included "nothing which inherently or necessarily requires judicial determination." *Ibid.*, 458. See *Katz*, Federal Legislative Courts, 43 Harv. L. Rev. 894.[3]

True, Congress in 1958 sought to declare that court as one "established under Article III of the Constitution of the United States." 72 Stat. 848, 28 U.S.C.A. 211. What the effect is of such a declaration need not here be explored. The important fact, and one only emphasized by the 1958 amendment, is that as of 1952 and earlier, [fol. 98] the Court of Customs and Patent Appeals was plainly a legislative and not a constitutional court. The 1958 amendment can neither add to nor detract from the status of Judge Jackson as of the time of his retirement on April 1, 1952, or later.

The conclusion seems to follow that Judge Jackson was never nominated or confirmed for any position other than that of a judge on a legislative court.

B. *The constitutional nature of the United States District Court for the District of Columbia.* On the other hand, the District Court below is very plainly one of the "constitutional courts of the United States, ordained and established under Art. 3 of the Constitution; that the judges of these courts hold their offices during good behavior, and that their compensation cannot, under the Constitution, be diminished during their continuance in office." *O'Donoghue v. United States*, 289 U.S. 516, 551. In addition, certain administrative or non-judicial functions may constitutionally be given the court below, making it something of a hybrid court from the constitutional viewpoint. Such non-judicial functions grow out of the power of Congress to legislate for the District of Columbia. See 1 Moore, Federal Practice, Sec. 0.4(4), page 72 (2d ed.). But the basic fact remains that it is essentially and primarily a constitutional court, the judges of whom are nominated, confirmed and vested with authority for

[3] See discussion of this matter by this Court in *Eastern States Petroleum Corp. v. Rogers*, No. 15109, decided May 12, 1960.

purposes of exercising the judicial power of the United States under Article III of the Constitution.

C. *The statutory basis of Judge Jackson's assignment.* There can be no doubt, moreover, as to the purported *statutory* authority for the assignment of a retired member of the Court of Customs and Patent Appeals to the District Court below. Under 72 Stat. 849, 28 U.S.C.A. 294, as amended in 1958, and even before, a retired judge [fol. 99] of the former court can be designated and assigned to the court below. For purposes of that statute, a retired judge of the Court of Customs and Patent Appeals is a "retired judge of the United States."

D. *The constitutional question as to the validity of the assignment.* The ultimate question thus is whether a designation and assignment to the court below of a judge who retired in 1952 from the Court of Customs and Patent Appeals can *constitutionally* be made so as to authorize such a judge to exercise the judicial powers of the court below. Or, can 72 Stat. 849, 28 U.S.C.A. 294, constitutionally be utilized to effect such an assignment?

The answer to that question is both unclear and significant in terms of petitioner's right to be tried by a tribunal properly constituted. See *United States* v. *American-Foreign SS. Corp.*, 363 U.S. 685, as to the standing of a litigant to raise such an issue. It is a right which is truly significant and essential to the preservation of basic procedural guarantees. As the Supreme Court emphasized in *Toth* v. *Quarles*, 350 U.S. 11, 15-16, Article III courts are established "to try cases and controversies between individuals and between individuals and the Government. This includes trial of criminal cases. These courts are presided over by judges appointed for life, subject only to removal by impeachment. Their compensation cannot be diminished during their continuance in office. The provisions of Article III were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government."

In other words, can Congress authorize the trial of an individual accused of crime—whether that crime be outlawed by the District Code or the United States Code—by

[fol. 100] a court consisting of any judge other than one who originally was vested with authority to sit on an Article III court? Could Congress, for example, authorize a retired Tax Court judge to be assigned to the court below?

The Supreme Court in *Ex parte Bakelite Corp.*, 279 U.S. 438, 460, implied that there may be "constitutional obstacles to assigning judges of constitutional courts to legislative courts." Equally true, and perhaps more so, there may be constitutional objections to assigning a retired legislative court judge to a constitutional court, particularly in order to exercise a judicial function. Such a retired judge may not have the constitutional status and freedom which only an Article III court judge can have.

Precisely those doubts have been adverted to in 1 Moore, Federal Practice, Sec. 0.4(1), page 60, note 34 (2d ed.), where it is noted that "Doubt as to the constitutionality of assigning judges from constitutional to legislative courts and vice versa was a reason Congress assigned for classifying the Court of Claims and Customs Court as constitutional courts." And see Note, 69 Harv. L. Rev. 760, casting doubt on the propriety of the assignment of a territorial court judge from Hawaii to the Court of Appeals for the Ninth Circuit in *Irish* v. *United States*, 225 F. 2d 3.

This problem, as indicated, is not easy of solution. See the diversity of opinion as to a related matter in *National Mutual Insurance Co.* v. *Tidewater Transfer Co., Inc.*, 337 U.S. 582. But enough has been indicated to show that the problem is an important one inescapably presented by this case. It deserves full review and consideration by this Court, after the parties have had opportunity to explore and brief the manifold facets.

[fol. 101] Conclusion

For the foregoing reasons, petitioner should be granted leave to prosecute his appeal *in forma pauperis*. Petitioner's good faith has been more than adequately established "by the presentation of any issue that is not plainly

frivolous" so as to survive dismissal in the case of an non-indigent litigant. *Ellis v. United States*, 356 U.S. 674.

Respectfully submitted,

s/ Eugene Gressman
EUGENE GRESSMAN
1701 K Street, N.W.
Washington 6, D. C.
Counsel for Petitioner
appointed by this Court.

August 31, 1960

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 102] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Misc. 1481

[Title omitted]

OPPOSITION TO MEMORANDUM IN SUPPORT OF PETITION FOR LEAVE TO PROSECUTE AN APPEAL IN FORMA PAUPERIS—
Filed September 19, 1960

Comes now respondent by its attorney, the United States Attorney, and makes this opposition to the petition for leave to prosecute an appeal in forma pauperis.

The memorandum filed by appointed counsel asserts two grounds in support of the petition. One relates to the references that the complaining witness had known appellant at Occoquon. The first reference, made in response to a prosecution question, was stricken on the prosecution's motion. The second reference was contained in a question asked by defense counsel. It, too, was stricken on the Government's motion. But defense counsel resisted, stating "Your Honor, I believe I have a right to ask where he knew this man." In response to this argument, the court made the third reference; and the complaining witness then volunteered the fourth. (Mem. 6.) Accordingly, defense counsel was himself in great measure responsible for the references. In these circumstances, they cannot constitute the plain error necessary for review in the absence of objection. Rule 52(b), Federal Rules of Criminal Procedure. Not only did defense counsel make no objection to the references, he also did not object to the court's instruction that they could be considered by the jury only insofar as they bore upon the credibility of the complaining witness. What [fol. 103] ever difference there may be between this instruction and one that the references could not be considered with respect to appellant is too insubstantial to overcome the absence of objection. Rule 30, Federal Rules of Criminal Procedure.

Second, the memorandum questions the constitutionality of Judge Jackson's assignment to the District Court. The premise of the argument is that Judge Jackson retired from the Court of Customs and Patent Appeals when it was a legislative court and that the 1958 legislation (28 U.S.C. § 211) making it an Article III court "can neither add to nor detract from the status of Judge Jackson as of the time of his retirement on April 1, 1952, or later" (Mem. 16). The difficulty with this premise is that upon retirement Judge Jackson had a status as a retired judge which the 1958 legislation could and did affect. Appointed counsel does not suggest that the judges sitting on the Court of Customs and Patent Appeals at the time of the 1958 legislation did not thereby become judges of an Article III court. Yet none of them was nominated or confirmed as a judge of an Article III court. Nor was any of them renominated or reconfirmed after the legislation was enacted. Just as the 1958 legislation made them active judges of an Article III court, it constituted Judge Jackson a retired judge of an Article III court. The premise of appointed counsel's argument thus falls and, with it, the conclusion that a substantial question is presented. Other questions raised in the petition but not in the memorandum are, as the memorandum notes, without merit (Mem. 7-8).

Wherefore, it is respectfully submitted the petition for leave to prosecute an appeal in forma pauperis be denied.

s/ Oliver Gasch (CWB)
OLIVER GASCH,
United States Attorney.

s/ Carl W. Belcher
CARL W. BELCHER,
Assistant United States Attorney.

s/ Stephen N. Shulman (CWB)
STEPHEN N. SHULMAN
Assistant United States Attorney.

[fol. 104] CERTIFICATE OF SERVICE
(omitted in printing)

[fol. 104] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

REPLY MEMORANDUM FOR PETITIONER
Filed September 19, 1960.

On behalf of the petitioner, this memorandum is filed in reply to the respondent's opposition to the petition for leave to prosecute an appeal *in forma pauperis*.

Respondent's opposition consists solely of a denial of the merits of the two questions presented on behalf of petitioner. But such a denial is not relevant in the present posture of this case. The Supreme Court has warned against converting the "good faith" test of 28 U.S.C. § 1915 "into a requirement of a preliminary showing of any particular degree of merit." *Ellis* v. *United States*, 356 U.S. 674, 675. It is enough that the issues raised are plainly not frivolous so that the appeal would not be dismissed in the case of a nonindigent litigant.

Certainly the issues here raised do not fall into the plainly frivolous category. Whether the circumstances attending the revelation of petitioner's criminal record constitute plain error that can be corrected by this Court in the absence of objection is obviously a non-frivolous issue and respondent's simple denial of its merits cannot transform it into a frivolous one. So, too, the question as to the constitutionality of Judge Jackson's assignment is inherently a novel and substantial one, whatever re- [fol. 105] spondent may think of its merits. To put the matter simply, had this appeal been by a nonindigent defendant respondent could not have utilized its opposition herein to secure the dismissal of the appeal under Fed. Rules Crim. Proc. 39(a).

Even assuming some discussion of the merits is appropriate, however, respondent overlooks two vital facts in its opposition:

(1) The prosecutor knew or should have known, by virtue of the U.S. Commissioner's report, that the complaining witness had first met petitioner in prison. The major responsibility for setting into operation the chain of statements to that effect must fall on the prosecution. And the trial judge's failure to correct the impression thus gained by the jury and to give proper instructions may well be an error of the most egregious sort.

(2) This case does not involve the assignment of any judge of the Court of Customs and Patent Appeals sitting at the time of the 1958 legislation. Whether there are different considerations as to such judges does not have to be reached in this case. The only conceivable question here relates to a judge who retired long before the 1958 legislation. As to him the effect of that legislation on judges sitting in 1958 has no direct bearing. The constitutional question as to him is substantial and unanswered.

Respectfully submitted,

/s/ Eugene Gressman
1701 K Street, N.W.
Washington 6, D.C.
Counsel for Petitioner
appointed by this Court.

September 19, 1960.

[fol. 106] CERTIFICATE OF SERVICE
(omitted in printing)

[fol. 107] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1481

[Title omitted]

Before: Wilbur K. Miller, Bastian and Burger, Circuit Judges, in Chambers.

ORDER DENYING PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—September 23, 1960

Upon consideration of the petition for leave to prosecute an appeal in forma pauperis and of the memoranda in support and the opposition, it is

ORDERED by the court that the petition for leave to prosecute an appeal in forma pauperis is denied.

Per Curiam.

[fol. 108] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 109] * * * *

[fol. 110] SUPREME COURT OF THE UNITED STATES

No. 480 Misc., October Term, 1960

BENNY LURK, PETITIONER

vs.

UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—January 23, 1961

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 669.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 O 586105 9HR